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IN THE

Supreme Court of the United States

October Term, 1963
No. 1002

MARVIN R. COLE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Brief for Petitioner in Reply to Brief for the United States in Opposition.

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Preliminary Statement.

This reply to the Government's Brief in Opposition is presented because of the Government's failure to meet head on, or even to discuss, the grounds upon which the writ of certiorari is sought. Instead of such a discussion the Government offers only a question-begging, non-responsive argument on the substantive merits of the questions tendered by the petitioner, designed apparently, to show that the court below did not err. We deem it advisable not to let that argument go unchallenged, notwithstanding that the Bar has been told many times by this Court that certiorari is granted, not necessarily because the court below was wrong but because of the public importance of the question decided, or of the necessity for preserving uniformity of decision. [*Hamilton Shoe Co. v. Wolf Brothers*, 240

U.S. 251, 257-258, and cases there cited; *Magnum Import Co. v. Coty*, 262 U.S. 159, 162-163.] Be that as it may, the opposition argument at least shows that the question is a substantial and important one upon which this court ought to speak.

ARGUMENT.

I

Advice to Claim a Constitutional Right Is Not Obstructive Conduct.

1. The question here is whether advice to a potential grand-jury witness to claim his privilege against self-incrimination, is an obstruction of the due administration of justice if, *ex hypothesi*, the advice is offered in the self-interest of the advisor or accompanied by threats. To answer that question obviously takes something more than merely to transform it into a declarative statement. So to beg the question adds nothing to the argument. In essence, however, that is all that the Government's discussion amounts to.* [See, *Gov. Br.* 11-12, par. 1.]

2. If, as is undenied in this case, the claim of privilege by the witness was a lawful one, and, if, as is the law, his motives or reasons for making the claim are immaterial [*United States v. Courtney*, 2 Cir., 236 F. 2d 921, 923; *Shendal v. United States*, 9 Cir., 312 F. 2d 564, 565], it is necessary, to uphold the Government's position, to accept either of two hypotheses. Those hypotheses are, first, that the claim of the privilege, even though a lawful one, is *ex proprio vigore*

Brown v. Walker, 161 U. S. 591 had nothing whatever to do with a claim of privilege to protect another. The Government's characterizations of the case [Gov. Br., 11] is an overstatement.

an obstruction of the due administration of justice; or, second, that the proscriptive statute penalizes not merely the end result of obstructing justice but, as well, and regardless of result, the means by which it is endeavored to bring the obstructive result about.

The first of these hypotheses cannot be seriously considered. So important a part of our legal system is the privilege that, as Mr. Justice Black concurring in *Grunewald v. United States*, 353 U.S. 391, 426, said, the Founding Fathers deemed it "worthy of enshrinement in the Constitution . . ." It is a fundamental part of the due administration of justice. Resort to it, therefore, cannot be an obstruction. [See, the cases cited at page 17 of the *Petition*.]

The second hypothesis cannot be accepted in the face of the statute's history and its evident purpose. The statute is a direct descendant of the Act of March 2, 1831, c.99, 4 Stat. 487. That Act, as is well known, was inspired by the desire to limit the power of judges to punish summarily, as a contempt, obstructions of the court's proceedings taking place out of the presence of the court. [See, *Bridges v. Superior Court*, 314 U.S. 252, 287-288.] The abuse of the contempt power by Judge Peck in summarily convicting a newspaper publisher who had criticized one of the judge's decisions led to his impeachment, and, in the same session of Congress that tried the impeachment [*Gales & Seaton's Register of Debates in Congress*, pp. 3, 561], to the Act of March 2, 1831. The Congress was concerened with the effect upon the administration of justice not with the means by which that effect was produced. In other words, it was concerned with the kind of acts that would be a contempt of court;

acts which, if committed out of the court's presence, it was desired to make punishable only after a plenary trial. Attention was centered on obstructions of the court's proceedings, not on the method of accomplishing an obstruction.

To this history there should be added the language of the statute, its evident purpose, and the national government's traditional abstention from penalizing merely wrongful conduct of a sort that the States are fully equipped to handle. Taken all together, the conclusion follows that the statute must be read as not penalizing the means of effecting an obstruction of justice, but only the result of obstruction. That argument has gone completely unnoticed by the Government.

3. The legislative history has one other item of significance to add in this connection. As originally enacted, the statute penalized the endeavor "to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the *discharge of his duty* . . ." [Act of March 2, 1831, §2, 4 Stat. 488. Italics ours.] With the italicized phrase in the statute, it is clear that what was aimed at, as we said in our Petition, pp. 16-17, was "some act by a witness that is contrary to the witness's duties as a witness . . ." The phrase is no longer in the statute. It was eliminated, however, only because in 1945 the Attorney-General, recommending some additions to the statute not material here, pointed out that the phrase about discharge of duty "appears to be surplusage and should be stricken." [*Senate Report No. 225*, 79th Congress, 1st Session.] Obviously, it was felt that elimination of the phrase would not change the statute's meaning.

4. The question here involved was not decided in *Grunewald v. United States, supra*, 353 U.S. at 424. [Gov. Br. 12-13.] What was decided, and all that the Government contended, in that case, was that since there was ample evidence to sustain the finding that the lawyer-defendant had attempted to get a witness to give false and manufactured testimony, it was idle to argue that the attempt was only a lawyer's advice to plead the self-incrimination privilege.*

5. Since the Petition was filed, this Court has decided *Brotherhood of Railroad Trainmen v. Virginia*, (April 20, 1964) ..... U.S. ..... [Oct. Term 1963, No. 34], in which it was held that advice to retain a certain lawyer was speech protected by the First Amendment. It is fairly arguable that the advice involved in the case at bar is similarly protected. That should be a weighty consideration in determining whether the statute here in question may be interpreted as proscribing such advice.

II

The Decision Below Conflicts With Rosner v. U. S.

1. The assertion that the decision below does not conflict with *Rosner v. United States*, 2 Cir., 10 F. 2d 675 [*Gov. Br.*, 13-14] misconceives the respect in which that conflict exists. [See, *Petition* 19-21.] *Rosner* decided that advising a defendant in a criminal

*Point III in the Government's Brief in this Court in *Grunewald* [Oct. Term 1956, No. 184] makes this very plain. It was there said: ". . . it is clear that the issue is not whether the verdict could rest on petitioner's advice to the witness as a lawyer to refuse to answer questions on the ground that the Fifth Amendment protected him. The verdict rested on a finding that petitioner intended to impede justice by influencing a witness not to tell the truth."

case not to respond to a non-obligatory request from a United States attorney to appear before a Federal court, was not a violation of the obstruction statute. That request, the court reasoned, was not process and the defendant was not obliged to heed it. Ignoring it, therefore, was not wrongful or unlawful. Advising one to do an act not wrongful or unlawful in respect of the administration of justice, was not obstructive. In the instant case, however, it was one of the government's theories that advice to take a vacation, given to one who had been orally requested by a United States Attorney to appear before a Federal grand jury, was obstructive. [*Petition*, Appendix "B", pp. 13, 22.] Had the rationale and holding of *Rosner* been applied, the holding in the case at bar would have had to be the opposite of what it was. In this respect, the two decisions are in direct conflict.

2. To say that *Rosner* was limited in *United States v. Polakoff*, 121 F. 2d 333, is seriously to overstate what was done in the latter case. What was done in respect of *Rosner*, and all that was done, was to distinguish it on the ground that it held that "since a mere request by the prosecutor that an accused appear could be disregarded as not compulsory, advice to that end was not illegal . . .", whereas the question in the *Polakoff* case was whether a fraudulent attempt to influence a prosecutor was a "corrupt" endeavor to influence any . . . officer . . ."

The scope and vitality of *Rosner* on its facts, and, therefore, as a precedent for similar or analogous facts, were left wholly unimpaired. And even if it be assumed that it was limited to its special facts, *i.e.*, as the *Polakoff* court said, to the fact of advice to disre-

gard a non-compulsory request to appear, that is the fact in the case at bar that relates to the government's "take a vacation" theory.

3. To be sure, the Court of Appeals refused to follow the decision of the District Court for the Northern District Court of California in *United States v. Herron*, 28 F. 2d 122. The fact that to decide our case it was necessary to disregard a factually identical, even though non-binding, Federal decision shows the importance of the question, and the necessity for an authoritative ruling by this Court. [See, *United States v. Constantine*, 296 U.S. 287, 290; *Shapiro v. United States*, 335 U.S. 1, 4.]

Conclusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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